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No. 89-266

In The

Supreme Court of the United States

October Term, 1989

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

1. May the State of Montana constitutionally impose beneficial use taxes upon an investor-owned utility, for its use of 500 kv transmission line facilities in Montana, when such 500 kv transmission line facilities are reserved in favor of the investor-owned utility pursuant to a transmission agreement with the Bonneville Power Administration?

2. May the State of Montana constitutionally impose beneficial use taxes upon an investor-owned utility for its use of 500 kv transmission line facilities in the State of Montana, while recognizing that rural electric cooperatives are not similarly situated entities and that they do not use the 500 kv transmission line systems of the Bonneville Power Administration?

3. May the Legislature of the State of Montana constitutionally impose beneficial use taxes upon the use of 500 kv transmission line facilities, which are used for bulk power transfers of investor-owned utility power, thereby recognizing that lower voltage transmission line systems are not dedicated to such use?

4. May the State of Montana constitutionally impose beneficial use taxes upon entities which are users of 500 kv transmission line facilities in Montana and may it impose beneficial use taxes upon users of state owned tax exempt property?

5. May the State of Montana impose beneficial use taxes upon investor-owned utilities, as a result of their use of 500 kv transmission line systems, by relying upon the unit method of appraisal?

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

The Respondents, the Department of Revenue of the State of Montana, two Montana counties and their respective Treasurers, and the State Superintendent of Public Instruction, respectfully request that this Court deny the Petition for a writ of certiorari, seeking review of the decision of the Montana Supreme Court. That opinion is reported at *Portland General Electric Co. v. Department of Revenue*, ___ Mont. ___, 773 P.2d 1189 (1989).

OPINIONS BELOW

This case represents the second beneficial use tax case which was tried before the Honorable Henry Loble, District Judge for the First Judicial District, Lewis and Clark County, Montana. The opinion of the District Court appears at 13a of the Petitioner's Appendix. The opinion of the Montana Supreme Court appears at 21a of the Petitioner's Appendix. The first beneficial use tax case was tried before Judge Loble as well. *Pacific Power & Light Co. v. Department of Revenue*, No. 50978. The opinion appears at 29a of the Petitioner's Appendix. The decision in the *Pacific* case was affirmed by the Montana Supreme Court. Its decision appears at 51a of the Petitioner's Appendix.

The Petitioner herein, and four other Montana Colstrip owners, challenged the imposition of beneficial use taxes upon them in the *Pacific* case in 1984. They raised three constitutional claims which were founded upon the United States Constitution. All of the constitutional claims which Portland General Electric Co. (PGE) seeks to raise in this Court, were resolved by the Montana

Supreme Court in *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176 (1989). The entire trial record, including transcripts and exhibits, as well as deposition testimony in the *Pacific* case, was incorporated by reference into the PGE trial.[1]

STATEMENT OF THE CASE

A. The Facts

The Montana Supreme Court set forth the foundational facts with respect to the use of the 500 kv transmission line systems in its opinion in the *Pacific* case. The interest of PGE in the 500 kv transmission line systems cannot be viewed in isolation. Its interest must be viewed in conjunction with the interests of the other four investor-owned utilities who planned, designed and own the Colstrip generating plants in Montana.

Rosebud County, Montana is the location of one of the largest coal-fired generating facilities in the United States. The generating facilities include four separate units, commonly identified as Colstrip Units 1, 2, 3, and 4. Colstrip Units 1 and 2 are jointly owned by Puget Sound Power & Light Co. (Puget) and by the Montana Power Co. (MPC). Puget is a Washington investor-owned utility, which has service territory in the Puget Sound area of Washington. MPC is a Montana investor-owned utility, which has service territory in Montana and a small service territory in Wyoming.

Colstrip Units 3 and 4 are jointly owned by five investor-owned utilities. Those investor-owned utilities

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[1] References in this Brief to the *Pacific* record are designated by the word *"Pacific"* appearing before the transcript citation. Accordingly, a citation to transcript page 77 of the *Pacific* case would appear in this Brief as *"Pacific* Tr. 77". The name of the witnesses providing the testimony follows the citation. A citation to an exhibit which was introduced in the *Pacific* case would appear in this Brief as *"Pacific* – Def. Ex. 43".

include PGE, Puget, MPC, Pacific Power & Light Co. (Pacific), and Washington Water Power Co. (WWP). Pacific is an Oregon investor-owned utility which has service territory in Oregon, Idaho, northwestern Montana, and Wyoming. WWP is a Washington investor-owned utility, which has service territory in the Spokane, Washington area.

Colstrip Units 1-4 produce 2,000 megawatts of net generation. The Colstrip plants represent the largest single source of coal-fired generation in the Pacific Northwest, other than the Jim Bridger generating plants in Wyoming.

Puget owns 50% of the net generation at Colstrip Units 1 and 2, or 300 megawatts. MPC owns 50% of the net generation at Colstrip Units 1 and 2, or 300 megawatts. MPC also owns 30% of the net generation at Colstrip Units 3 and 4, or 210 megawatts. Pacific owns 10% of the net generation at Colstrip Units 3 and 4, or 140 megawatts. WWP owns 15% of the net generation at Colstrip Units 3 and 4, or 210 megawatts. PGE owns 20% of the net generation at Colstrip Units 3 and 4, or 280 megawatts.

The five investor-owned utilities which own the Colstrip generating plants will be referred to in this Brief as the Colstrip owners. The Colstrip owners readily concede, and the Montana Supreme Court found, that they lacked adequate transmission line capacity in order to transmit their respective shares of Colstrip power from the Colstrip generating plants in Rosebud County, Montana, to their respective load centers, both within and outside the State of Montana.

During the early 1970's, the Colstrip owners retained the services of an independent consultant, in order to plan the 500 kv transmission line system from the generating plants to the Northwest. The history of the planning for the 500 kv transmission line system from the plants, across Montana, is aptly set forth in the Environmental Impact Statement prepared by the Bonneville Power Administration (BPA) during 1983. (Pacific – Def. Ex. 36).

In order to secure adequate transmission line capacity for their Colstrip power, the Colstrip owners engineered, paid for, and operate a 500 kv transmission line system from the Colstrip generating facilities to a point near Townsend, Montana. The use of that 500 kv system is governed by an agreement denominated as the Colstrip Project Transmission Agreement. (Pacific – Pl. Ex. 5). The transmission line system extends 114 miles between Colstrip and Townsend. (Resp. App. 12).

Recognizing that a 500 kv system was required for adequate transmission of Colstrip power across Montana, the Colstrip owners requested that the BPA design and construct a 500 kv system which would be complementary to the system which the Colstrip owners were constructing to a point near Townsend. The Colstrip owners' formal request to BPA was made during September 1977. (Pacific – Def. Ex. 44). BPA agreed to construct that transmission line system for the Colstrip owners. The transmission line system extends 90 miles between Townsend, Montana, and a substation at Garrison, Montana. It is commonly referred to as the Montana Intertie. The use of the Montana Intertie is governed by an agreement between BPA and the five Colstrip owners, denominated as the Montana Intertie Agreement. (Pacific – Pl. Ex. 7). The Montana Intertie was first energized during October 1983.

The use of the Montana Intertie and the imposition of beneficial use taxes was extensively examined by the Montana Supreme Court in the *Pacific* opinion.

At the time that the 500 kv system was being planned, the Colstrip owners recognized that there was a lack of transmission line capacity for Colstrip power east of the BPA Substation at Hot Springs, Montana. (Resp. App. 12). At the time the initial planning for the Colstrip transmission system was undertaken, BPA had a 500 kv system extending from its Hot Springs Substation in Montana to Dworshak, Idaho. The Hot Springs to Dworshak 500 kv system provided the then existing

"gateway" for transmission of Colstrip power to the Pacific Northwest from Montana.

> The Garrison-Spokane 500-kv Transmission Project is a proposal to build 500,000-volt transmission line facilities across western Montana and northern Idaho to the Spokane area in order to reinforce a section of the Bonneville Power Administration's electric power grid and to permit reliable integration of 1,240 megawatts of power produced by Colstrip Units 3 and 4, for use in Montana and throughout the Northwest. (Pacific – Def. Ex. 36, Pg. i).

After Colstrip Unit 3 was energized during October 1983, the Colstrip owners faced a severe limitation in their ability to transmit Colstrip power west of the Garrison Substation. The transmission line limitation was referred to by the Montana Supreme Court as the "bottleneck" in its *PGE* opinion. It was caused by the absence of a 500 kv system between the Garrison Substation and the Hot Springs Substation. In order to alleviate the lack of transmission line capacity, the Colstrip owners had requested that the 500 kv system be completed to Hot Springs. (Pacific – Def. Ex. 44). Bonneville complied with their request by constructing a 500 kv system from the Garrison Substation to the Taft Substation. The Taft Substation is an interconnection point on the Hot Springs to Dworshak 500 kv system. The Garrison to Taft 500 kv system extends 159 miles through western Montana. (Resp. App. 12). It was energized during October 1985. The Montana Supreme Court made specific findings with respect to the use of that transmission line system, for the transmission of Colstrip power, in its *Pacific* and *PGE* opinions.

In order to secure their rights in a transmission line system for their Colstrip power, the Colstrip owners entered into agreements with BPA which have been referred to as the "Garrison West Agreements". Each Garrison West Agreement secures specific transmission demands in Bonneville's 500 kv system in favor of a Colstrip owner. Those agreements, and the transmission

demands set forth therein, were the predicate for the imposition of beneficial use taxes upon the Colstrip owners, including PGE. The Garrison West Agreements are essentially leases, by which the Colstrip owners have reserved transmission line capacity in BPA's system.

Once the Garrison to Taft 500 kv system was completed, the full transmission demands set forth in the Garrison West Agreements, in favor of the Colstrip owners, could be fully accommodated. All Colstrip power generated and scheduled from Colstrip could be transmitted across Montana to the respective loads of the Colstrip owners, both within Montana and in the Pacific Northwest.

B. The Proceedings in State District Court.

Beneficial use taxes, pursuant to Mont. Code Ann. § 15-24-1203 (1983), were imposed upon PGE for its use of the Hot Springs to Idaho Border portion of the 500 kv system. PGE paid approximately $12,700 under protest to Mineral and Sanders Counties, representing the 1985 beneficial use taxes at issue. During a three-day trial before the District Court, PGE produced no power sales contracts by which Montana cooperative customers are served by BPA, nor did it call any witness from a cooperative who was knowledgeable about its operations and its relationship to the 500 kv system. On January 19, 1988, the District Court sustained the imposition of the beneficial use taxes upon PGE for the 1985 tax year.

REASONS WHY THE WRIT SHOULD BE DENIED

The Montana beneficial use tax statute passes constitutional muster under the applicable precedents of this Court. The jurisprudence regarding beneficial use taxation emanates from this Court's decisions in *United States v. County of Fresno*, 429 U.S. 452 (1977), and the trilogy of the 1958 Michigan beneficial use tax cases. The Montana Supreme Court properly applied this Court's decisions in

adjudging the constitutionality of Mont. Code Ann. § 15-24-1203. Beneficial use taxation of private users of federal property is settled law.

PGE has admitted that its Commerce Clause allegations must be measured against this Court's decision in *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981). Last term, this Court held:

> *Complete Auto* abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the States. We recognized that, with certain restrictions, interstate commerce may be required to pay its fair share of State taxes.

D.H. Holmes Co. v. McNamara, ___ U.S. ___, 108 S.Ct. 1619, 1623 (1988).

The Montana Supreme Court correctly recognized that beneficial use taxation of 500 kv transmission lines was enacted by the Legislature in order to prevent a tax injustice. Owners of 500 kv systems in Montana are subject to property taxation. Mont. Code Ann. § 15-23-101. (Resp. App. 2). Before the 1983 amendment to Mont. Code Ann. § 15-24-1203, users of tax exempt 500 kv transmission lines in Montana would not have paid any taxes despite the design and operation of a 500 kv system expressly for their benefit. Since the Colstrip owners use the 500 kv system in order to transmit their private power for sale, both within and outside of Montana, they ought not to escape taxation based upon that use. *United States v. City of Detroit*, 355 U.S. 466 (1958), *United States v. Boyd*, 378 U.S. 39 (1964).

The Montana beneficial use tax statute does not infringe the Supremacy Clause. None of the beneficial use taxes which were levied upon the Colstrip owners, will be passed on to the United States. Neither the economic nor the legal incidence of the tax falls upon the United States. *United States v. County of Fresno*, supra. The United States has exhibited a lack of interest in this litigation. BPA and its counsel have been fully aware of this litigation for the past five years. The United States perceives

no threat through the imposition of beneficial use taxes upon the Colstrip owners.

Although Congress could act to preempt Montana beneficial use taxation, it has clearly refrained from doing so. Congress had the perfect opportunity to preempt Montana beneficial use taxes when it enacted the Northwest Electric Power Planning and Conservation Act of 1980. It deliberately elected not to preempt Montana beneficial use taxation.

The Montana beneficial use tax statute is applied so that interstate and intrastate users of the 500 kv system are treated in precisely the same fashion. There is no violation of the Anti-Discrimination Act. 15 U.S.C. § 391.

> The States have a very wide discretion in the laying of their taxes. . . . But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526 (1959).

A. Background Factors Supporting Denial of the Writ.

The Colstrip owners, including PGE, are well represented in the legislatures of Oregon and Montana. During 1989, the lobbyists for the Colstrip owners successfully killed the proposed Oregon beneficial use tax legislation. The political process worked in favor of the Colstrip owners.

In Montana, the Colstrip owners' lobbyists vigorously resisted the amendment to Mont. Code Ann. § 15-24-1203 during 1983. A corporate officer appeared on behalf of MPC to testify against the legislation. (Minutes of the House Taxation Committee, March 1, 1983). A lobbyist on behalf of Pacific similarly appeared to oppose the legislation. (Minutes of the House Taxation Committee, March 1, 1983, and minutes of the Senate Taxation Committee, March 25, 1983). The Montana Legislature, in a bi-partisan effort, amended the statute to authorize beneficial use taxation of 500 kv systems.

PGE's assertion that it has been disenfranchised from the political process is without merit.

The beneficial use taxes which the Colstrip owners have paid under protest during the pendency of this litigation, are general revenue taxes. They will be utilized to provide services and to educate several generations of Montana school children. Without beneficial use taxation of 500 kv transmission lines, interstate commerce would be placed "in a privileged position". *Commonwealth Edison v. Montana*, supra.

PGE's assertion that it must be guaranteed access to the federal courts is not meritorious. Congress is perfectly capable of providing access to the federal courts. It has accorded concurrent jurisdiction to the federal District Courts and to the state courts over claims arising under the Railroad Revitalization and Regulatory Reform and Relief Act of 1976. 49 U.S.C. § 11503(c). (Resp. App. 10). Congress is capable of withholding access to the federal District Courts, for other entities which may be aggrieved as a result of state taxation. In enacting Section 532 of the Tax Equity and Fiscal Responsibility of 1982, Congress reserved tax claims of operating airlines for the state courts. 49 U.S.C. § 1513(b). (Resp. App. 11). Congress has not chosen to afford investor-owned utilities access to the federal District Courts, in contested tax cases, because there is no justification for doing so.

B. The Supremacy Clause: Montana Beneficial Use Taxes May be Imposed Pursuant to the Rule in *United States v. County of Fresno*. Congress Has Not Expressly Preempted Beneficial Use Taxation.

The recent cases decided by this Court conclusively establish that the Supremacy Clause is unavailable to PGE as a means to escape beneficial use taxation.

1. Under *United States v. County of Fresno*, Beneficial Use Taxes May Be Imposed Because PGE Uses the 500 KV Transmission Line System to Transmit Privately Owned Power.

PGE's reliance upon *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), is completely misplaced. The Court

has held that a taxpayer may not invoke the inter-governmental tax immunity doctrine unless it "actually stands in the government s shoes." *United States v. New Mexico*, 455 U.S. 720 (1981). Unless the legal incidence of a tax falls on the United States, the Supremacy Clause will not bar imposition of the tax. *United States v. County of Fresno*, 429 U.S. 452 (1977).

> The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the state. This rule returns to the original intent of *M'Culloch v. Maryland*.

Id. at 462-463.

In order for a use tax to withstand constitutional scrutiny, it is not necessary that the federal property be exclusively in the possession of the taxpayer.

> These cases make clear that a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is in the possession or *use by* the private citizen that is being taxed.

Id. at 462.

In *County of Fresno*, the United States contended that Forest Service employees did not occupy the residences of the United States pursuant to any formal written leases. It argued that the interest of the Forest Service employees was akin to a license. The Court rejected that argument finding that a "beneficial personal use . . . " was sufficient to sustain imposition of California's possessory use tax. Id. at 467.

Montana's beneficial use tax statute squares perfectly with the *County of Fresno* rule.

> The tax shall be imposed upon the possession *or other beneficial use of an electric transmission line* and associated facilities, except the lines

> and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. Mont. Code Ann. § 15-24-1203 (1983).

The beneficial use in favor of PGE is manifestly evident from the record and from the opinions of the Montana Supreme Court in *Pacific* and *PGE*. The instrument by which PGE is able to transmit its Colstrip power over the Hot Springs to Idaho Border 500 kv system, elevates its use interest above the nature of the use interest which was found sufficient in *County of Fresno*. PGE's Garrison West Agreement secures substantial rights in the 500 kv system to PGE. It has a right to the capacity of the transmission line for Colstrip power. Colstrip power is power owned by PGE. The transmission demands under the Agreement are firm transmission demands. PGE has a continuous right to uninterrupted use of the transmission line system west of Garrison. It must have such firm use, in order to provide safe and reliable service to its customers. During trial, no other entity was demonstrated to have any firm transmission capacity in the 500 kv system west of Garrison. PGE has no other transmission contract, by which its Colstrip power can be transmitted west of the Garrison Substation. (PGE – Kirby Tr. Pgs. 217-218). PGE pays for the use of the transmission line system. The charge includes amortization of the 500 kv system, the cost of labor, operations, maintenance, and interest on the federal investment. The duration of the Agreement is coextensive with the life of the coal plants at Colstrip. In the event that BPA cannot provide transmission line capacity in order to satisfy the firm demands, it has an obligation to provide replacement power to PGE. PGE is responsible for the line losses associated with transmission of Colstrip power. It has 280 megawatts of Colstrip power. It has 270 megawatts of transmission demand under the Agreement. Before the 500 kv system was completed from Garrison to Taft, PGE could only transmit 65 megawatts of its Colstrip power west of Garrison. As found by the Montana Supreme Court, PGE must pay for its reserved transmission demands, even though none of

its power may be flowing over the transmission line system. In light of these facts, PGE's Garrison West Agreement with BPA is essentially akin to a leasehold interest. An engineer witness for Pacific testified that firm transmission contracts are akin to leases. (Pacific – Hammerquist Depo. Pgs. 82-83).

PGE's Garrison West Agreement secures to it a use interest in the 500 kv lines which is at least as substantial as the lease which formed the predicate for beneficial use taxation in *United States v. City of Detroit*, supra. In *United States v. Township of Muskegon*, 355 U.S. 484 (1958), this Court sustained the application of Michigan's beneficial use tax statute against a permittee, which was utilizing federal property in order to perform a contract with the United States government.

> The vital thing under the Michigan statute, and we think permissibly so, is that Continental was using the property in connection with its own commercial activities.

Id. at 485.

Significantly, this Court sustained the application of Michigan's general personal property ad valorem tax statute, against a federal contractor which was performing work on behalf of the United States government. *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958).

The reliance on *United States v. Hawkins County, Tennessee*, 859 F.2d 20 (6th Cir. 1988) cert. denied, 109 S.Ct. 1638 (1989), is misplaced. The case is distinguishable from the present case. The *Hawkins* case certainly must pale in comparison with *United States v. Boyd*, supra. This Court sustained application of Tennessee's tax statute against two private corporations which were using the Oakridge facility, in order to perform their contracts with the United States.

The dominant commercial motive of PGE and the Colstrip owners in ordering and reserving the 500 kv system is a fundamental basis for sustaining the tax. Under the rule in *United States v. County of Allegheny*, the use of the property is paramount in grounding the tax.

> . . . His personal advantages from the relationship by way of salary, profit or beneficial personal use of the property may be taxed as we have held.

United States v. County of Allegheny, 322 U.S. 174, 188 (1944).

The Montana Supreme Court placed great reliance upon this Court's decision in *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906). The use interest of PGE in the 500 kv system from Hot Springs to Idaho is more substantial than an equitable interest. It is a significant enforceable right in favor of PGE. It is a right which is far more substantial than the contractual rights to enter property and to cut timber which were the predicates for successful beneficial use taxation in *International Paper Co. v. County of Siskiyou*, 515 F.2d 285 (9th Cir. 1974).

PGE is accustomed to use taxation based upon its non-possessory interests in federal property. *Portland General Electric Co. v. State Tax Commission*, 437 P.2d 827 (1968).

Various state courts have sustained beneficial use taxes, when the user converts federal property to a private commercial purpose. *Great Salt Lake Minerals & Chemical Corp. v. State Tax Commission*, 573 P.2d 337 (1977), *United States v. State of Nevada*, 493 P.2d 1324 (1972).

The beneficial use taxation of a reserved interest in a 500 kv system, is simply a modern application of a very traditional rule.

2. Congress Did Not Preempt Montana Beneficial Use Taxation When it Enacted 15 U.S.C. § 391.

PGE's reliance upon 15 U.S.C. § 391 is misplaced for several reasons. Congress specifically targeted the statute at the New Mexico electrical energy tax. The tax statute

was discriminatory on its face, because it provided a credit for in-state consumers of electrical energy while denying any credit or offset for out-of-state consumers. *Arizona Public Service Commission v. Snead*, 441 U.S. 141 (1979). The Montana beneficial use tax statute is facially neutral. It applies to intrastate users as well as interstate users of the 500 kv system.

PGE clearly misreads this Court's cases with respect to tax burdens and their constitutional significance.

> Instead, the gravamen of appellants' claim is that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers. Appellants do not suggest that this assertion is based on any of this Court's prior discriminatory tax cases . . . Consequently, to accept appellants' theory and invalidate the Montana tax solely because most of Montana's coal is shipped across the very state borders that ordinarily are to be considered irrelevant would require a significant and, in our view, unwarranted departure from the rationale of our prior discrimination cases . . . As previously noted, there is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers.

Commonwealth Edison v. Montana, 453 U.S. 609, 618-619.

PGE's Petition similarly reveals a paucity of authority in support of its contention that out of state consumers have been discriminated against through imposition of beneficial use taxes.[2]

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[2] The United States Congress had an opportunity to expressly preempt beneficial use taxation when it enacted the Pacific Northwest Electric Power Planning and Conservation

(Continued on following page)

C. The Commerce Clause: Montana's Beneficial Use Taxes Do Not Discriminate Against Interstate Commerce.

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), the Court held that

> . . . interstate commerce may be made to pay its way, and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology.

Id. at 281.

> A state has a significant interest in exacting from interstate commerce its fair share of the cost of state government.

Commonwealth Edison v. Montana, 453 U.S. 609, 616 (1981).

The purpose of the beneficial use tax statute is not in doubt. It was designed to ensure that a tax windfall would not enure to users of 500 kv systems. *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176, 1179. In Montana, investor-owned utility property, including 500 kv systems, is subject to ad valorem taxation. Mont.

(Continued from previous page)

Act of 1980. The legislative history reflects that Congress elected not to provide any system of "in lieu tax payments." Instead, Congress elected to provide a system of limited "impact aid payments" as a result of the presence of transitory construction personnel. Since the construction of the Hot Springs to Idaho Border portion of the 500 kv transmission line system preceded enactment of the Northwest Act, no impact aid payments have been made to Mineral or Sanders County.

PGE concedes the fallacy of its argument at footnote 13 page 11 of its Petition.

BPA's Montana District Manager, Mr. Eskridge, testified that he was responsible for implementing the impact aid provisions of the 1980 Act in Montana. During trial, he testified that BPA had no intention to provide a system of "in lieu tax payments" when it instituted its impact aid policy in Montana. (Pacific – Eskridge Tr. Pg. 538).

Code Ann. § 15-23-101. (Resp. App. 2). PGE pays property taxes on its 500 kv system from Colstrip to Townsend, Montana. But for the amendment to Mont. Code Ann. § 15-24-1203, PGE would have paid no taxes to Montana although it will have an unfettered and clear right to use the 500 kv system of BPA for nearly half a century. The Montana tax is an equivalency tax, to ensure that the State does not lose the revenue which it would otherwise secure if the 500 kv system were privately owned. This is precisely the rationale upon which Louisiana's use tax was sustained in *D.H. Holmes Ltd. v. McNamara*, supra.[3]

PGE's reference to *New Energy Co. of Indiana v. Limbach*, ___ U.S. ___, 108 S.Ct. 1803 (1988) is self-defeating. The Colstrip owners, including PGE, have no out of

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[3] Representative Marks introduced the amendment to Mont. Code Ann. § 15-24-1203 during 1983. His testimony is instructive.

> The tax exempt property that the sponsor of the bill is specifically interested in is the Bonneville Power line that runs across several counties in Montana. That power line hooks onto privately owned power lines. The plan will take the power line through a number of counties. The Bonneville Power Administration, through an amendment on an appropriation bill in Congress, received authority to come through the eastern side of the continental divide and build a line that could be hooked up to Colstrip 3 and 4. The counties that the power line went through did not receive any benefit from the construction of that line. No payment in lieu of taxes was given, except on rare occasions and that was just on a onetime [sic] basis. House Bill 747 would impose a privilege tax. It is unfair for government owned power companies to come in and compete with privately owned power companies. *If the power line would have been privately owned, the counties would have received taxes off that line.* (Minutes of the House Taxation Committee, March 1, 1983).

state competitors in Montana. They are the investor-owned utilities which produce power in Montana and they transmit it to their respective loads, both in Montana and outside of Montana. Montana Power Company, and its consumers and ratepayers, are accorded the same treatment under the statute that the Oregon and Washington utilities receive.[4]

PGE conceded in its Brief to the Montana Supreme Court that the nexus element under *Complete Auto Transit v. Brady*, supra, was not at issue. (PGE Brief, Pg. 18). It has now changed its position. Nevertheless, its contention is untenable. PGE has the unfettered right to drive 280 megawatts of Colstrip power across a 500 kv system, which extends 350 miles across Montana, for a period of 21 years. Without use of the 500 kv system, Colstrip Unit 3 and 4 could not be operated at their rated capacities. (Pacific – Brush Tr. Pg. 240). If the 500 kv system is unavailable, PGE's investment in Colstrip Units 3 and 4 is largely valueless. "There is nexus aplenty here." *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619, 1624 (1988).

PGE's own engineering witness, Mr. Mikolaitis admitted that without use of the Hot Springs to Idaho Border 500 kv system, the transmission line capacity for

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[4] Montana is fulfilling its responsibility to supply energy to the Nation. As noted in *Commonwealth Edison v. Montana*, (Dissenting opinion of Justice Blackmun), 25% of the proven coal reserves in the United States are in Montana. In order to facilitate this coal development, Montana provides a tax incentive for "new industry". Mont. Code Ann. § 15-6-135. (Pet. App. 11a). The Colstrip owners enjoyed this tax incentive as a result of their development of the Colstrip generating plants. *Department of Revenue v. Puget Sound Power & Light Co.*, 179 Mont. 255, 587 P.2d 1282 (1978). Puget's Montana ad valorem taxes were reduced by 75% for three years after development of the plants. PGE received the same tax benefit as a result of its investment in Colstrip Units 3 and 4.

purposes of satisfying its Garrison West transmission demands, would be "severely limited". (PGE – Mikolaitis Tr. Pg. 77). He also admitted that the split of power at the Hot Springs Substation will be substantially in favor of the 500 kv line from Hot Springs to Dworshak, because it presents the path of least impedance to the flow of power. (PGE – Mikolaitis Tr. Pg. 78). PGE's Garrison West Agreement reflects that its transmission demands were severely limited until the 500 kv system was completed to the Hot Springs Substation. (PGE – Mikolaitis Tr. Pg. 62). Every engineering witness considered the Hot Springs to Idaho Border portion of the 500 kv system to be an integral portion of the capacity necessary to transmit Colstrip power.

In analyzing the Commerce Clause decisions of this Court, affecting state taxes, one commentator has written . . . The effect of these decisions has been to recognize "a commerce clause jurisprudence rooted in practical economic consequences of state taxes . . . " Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 The Tax Lawyer 37, 70 (1987). The practical economic consequence of the Montana beneficial use tax is that it plugs a loophole. Users of 500 kv systems should not escape taxation. Since Montana's beneficial use tax statute satisfies each element set forth in *Complete Auto Transit v. Brady*, supra, it is not constitutionally objectionable.

1. Montana Tax Statutes Do Not Discriminate Against Interstate Commerce.

The Montana tax statutes provide for a classified system of property taxation. The purpose of such a tax classification system is to ensure that various types or classes of property are taxed according to their use, productivity, and general economic setting in society. *Department of Revenue v. Montana Stockgrowers Ass'n*, ___ Mont. ___, ___ P.2d ___, 46 St. Rep. 1132 (1989). Such tax classification systems have been uniformly sustained against equal protection and commerce clause challenges.

Nashville C. & St. L. Ry. Co. v. Browning, 310 U.S. 362 (1940), *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

a. The Montana Legislature Appropriately Enacted a Beneficial Use Tax Statute For 500 KV Transmission Line Systems.

BPA and the Colstrip owners have acknowledged why the 500 kv system was constructed in Montana. BPA set forth a specific rationale for construction of the 500 kv system in Montana in its Environmental Impact Statement. It was denominated "Garrison-Spokane 500-kv Transmission Project" (March 1983).

> To transmit the additional Colstrip power reliably and efficiently, the existing Federal Columbia River Transmission System must be reinforced. Two 500-kv transmission lines will cross the State to western Montana so that power may be so integrated. At the request of the Colstrip Project Applicants, Bonneville has agreed to build part of the Colstrip integrating transmission system. . . . Successful integration into Bonneville's system will require reinforcement of part of the Federal system and extension of the main 500-kV electrical grid to the vicinity of Garrison, Montana. Without adding 500-kV transmission facilities to BPA's power grid, the existing transmission system would not be viable for transmitting the output of Unit 4, and would not form a reliable intertie to transmit the scheduled 1,240 MW of energy to Northwest users. (Pacific – Def. Ex. 36, Pgs. I-10 through I-11).

The engineering witnesses were agreed that the 500 kv system was necessary in order to successfully transmit Colstrip power across Montana. Dr. Heydt, Professor of Electrical Engineering at Purdue University, testified that the 500 kv system was necessary in order to transmit Colstrip power across Montana.[5] (Pacific – Heydt Tr. Pgs.

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[5] Dr. Heydt is the Respondents' electrical engineering expert witness.

666-667). Mr. Brush, MPC's engineer, testified that most of the Colstrip power flowed over the 500 kv system. He had that knowledge because he had run power flow studies in order to determine that fact. (Pacific – Brush Tr. Pg. 268). Mr. Brush was also able to state that the actual flow of power over any transmission line system is governed by the relative impedance of the system. (Pacific – Brush Tr. Pg. 218). Mr. Porter, of BPA, agreed that a 500 kv system will accommodate approximately 4.7 times more power than a 230 kv system. (Pacific – Porter Tr. Pg. 56). All of the engineering witnesses agreed that the power flow in the 500 kv system across Montana is controlled by setting the generation levels at the Colstrip plants. (Pacific – Tr. Pgs. 252, 367, 681-682). The Colstrip units are operated as base loaded units. They continuously supply 2,000 megawatts of power to the 500 kv system. (Pacific – Brush Tr. Pg. 255). Mr. Mikolaitis, of PGE, admitted that if the Hot Springs to Idaho Border portion of the 500 kv system was out of service, there would be insufficient transmission capacity to accept the firm 330 megawatts of limited transmission demand allocated to the Colstrip owners before the Garrison to Taft lines were completed. (PGE – Mikolaitis Tr. Pg. 77). The power split into the 500 kv system at the Hot Springs Substation is pronounced, because it provides the path with the least impedance to the flow of power. (PGE – Mikolaitis Tr. Pg. 78). If the Hot Springs to Idaho Border 500 kv system did not exist, the limited transmission demands in favor of PGE could not be accommodated. In Mr. Mikolaitis' words, the transmission capacity "would be severely limited". (PGE – Mikolaitis Tr. Pg. 92).

Since the Colstrip owners have admitted that the 500 kv system is critical to the transmission of their Colstrip power, they have provided a sufficient basis for the Montana Legislature to separately classify their use interests. Utilities with the right to use public property may be treated as a separate class for taxation purposes. *New York Rapid Transit Corp. v. New York*, 303 U.S. 573 (1938).

b. Montana's Tax Classification Scheme is Constitutionally Sound.

PGE attempts to denigrate Montana's tax classification system by suggesting that the property of cooperatives must be taxed at the same rate as the property of investor-owned utilities. Its argument is a veiled equal protection argument. It has been rejected by this Court since the late 1800's.

The cooperative customers of BPA are singularly distinctive from investor-owned utilities. The facts supporting that distinction will be set forth in section 3a of this Brief.

The equal protection clause is not infringed by taxing one class of property while leaving another class untaxed. *Broad River Power Co. v. Query*, 288 U.S. 178 (1933). A state has a wide choice in classifying the subjects of taxation. *Bell's Gap Railway Co. v. Pennsylvania*, 134 U.S. 232 (1885). It may select the objects and purposes of taxation, from among the spectrum of property in the State. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937). " . . . [T]he states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

c. The Montana Legislature Recognized the Impact of 500 KV Transmission Line Systems by Amending Mont. Code Ann. § 15-6-141 During 1981.

PGE makes an argument concerning an eventuality. During 1981, the Montana Legislature amended Mont. Code Ann. § 15-6-141, by adding the following language:

> (a) centrally assessed electric power companies' allocations, including allocations of properties constructed, owned, or operated by a public agency created by the congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives).

Congress has not enacted legislation allowing any state to tax the property of a public agency, including BPA. PGE bases its argument upon an expectancy, which is not the law in Montana. For that reason, its argument should be summarily dismissed.

The rationale for the amendment to Mont. Code Ann. § 15-6-141 is apparent from the legislative history.

> Congress has granted the BPA the authority to go east of the Continental Divide, which they hadn't been able to do until about a year ago. Congress has tried to put legislation similar to HB 36 into law . . . Then BPA arrived on the scene and this upset the people. If a private utility wants the power lines, they have to pay taxes, and these power lines won't be taxed. The Congressional delegation introduced a bill which would provide for a tax, but that portion of the bill was taken out. Montana was asked to introduce a bill on the state level and thus HB 65 was drafted. Maybe then, this type of legislation would have a better chance on the federal level. BPA is using these lines to go back to the private lines, and this isn't justifiable. All the big corporations are going to use this electricity and Montana should get some tax dollars in return. This is the first of many lines that will traverse the state, and we should get a handle on this situation before we lose the power to do anything. (Minutes of the House Taxation Committee meeting, January 21, 1981).

The Montana Legislature has consistently recognized that the property of cooperatives is not comparable to the property of investor-owned utilities. The two separate types of properties have been separately classified for many years. Such classifications are constitutionally permissible. *Mueller v. Allen*, 463 U.S. 388 (1983).

d. Montana's Beneficial Use Tax Statute Does Not Discriminate Against Users of Federal Property.

PGE has consistently misrepresented the tax statute at issue. It cites to Mont. Code Ann. § 15-24-1203 (1987). This tax controversy arose when beneficial use taxes were imposed upon PGE, during 1985. The taxes were predicated upon Mont. Code Ann. § 15-24-1203 (1983). (Resp. App. 1). The 1987 amendment referred to by PGE did not become effective until October 1, 1987. Mont. Code Ann. § 1- 2-201. (Resp. App. 3). The statute which was construed and applied by the Montana Supreme Court is set forth at Petitioner's Appendix 22a. In the words of Justice Harrison:

> *This case concerns the imposition of beneficial use taxes, pursuant to § 15-24-1203, MCA (1983),* for appellant's use of the Hot Springs to Idaho Border portion of the BPA 500 kilovolts (KV) transmission line system within the State of Montana.

Portland General Electric Co. v. Department of Revenue, 773 P.2d 1189, 1190 (1989).

The Respondents specifically proved that they had imposed beneficial use taxes, pursuant to Mont. Code Ann. § 15-24-1203 (1983), upon users of state owned property and upon users of city owned property.

> *At trial the only references to imposition of beneficial use taxes on state-exempt property dealt with two short line railroads and the Great Falls Industrial Park.* The Bureau Chief for the Intercounty Property Bureau testified that in 1986 the DOR determined these railroads qualified for imposition of beneficial use taxes under § 15-24-1203, MCA. She testified that those taxes were appealed to the State Tax Appeal Board, but that at the time of the trial, January 19, 1987, the railroads were still subject to beneficial use taxation. The Cascade County Assessor testified that the DOR had assessed beneficial use taxes on users of facilities at the Great Falls Industrial Park where the DOR found private parties' use

> met the requirements of § 15-24-1203, MCA. Neither party introduced any other beneficial use of similarly situated state exempt property, though several instances of beneficial use of other federal exempt properties were described. *Based upon the above testimony we do not find the DOR discriminated against users of federal property in favor of similarly situated users of state exempt property.*

Pacific Power & Light Co. v. Department of Revenue, 773 P.2d 1176, 1184 (1989).

It is disingenuous for PGE to assert, as it does at pages 18 and 19 of its Petition, that the Department has not taxed users of state owned and city owned property. The record and the decision of the Montana Supreme Court, belie that argument. The reliance upon *United States v. Manassas*, 830 F.2d 530 (4th Cir. 1987), affirmed, 108 S.Ct. 1568 (1988) and *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 (1960) is entirely misplaced.

2. The Legislative History Supporting the Amendment to Mont. Code Ann. § 15-24-1203 (1983) Reflects That the Montana Legislature Sought to Close a Tax Loophole.

The legislative history reflects an effort by the Montana Legislature to prevent a tax windfall. The Legislature recognized that owners of 500 kv systems, such as the Colstrip owners, would pay ad valorem taxes. It also recognized that the investor-owned utilities, who had contracted for the use of the 500 kv system west of Townsend, would entirely escape Montana taxation. In order to close this loophole, the use tax statute was amended to include 500 kv facilities.

This Court has rejected the argument that taxes which are transferred to consumers, through ratemaking proceedings and contractual provisions, infringe the Commerce Clause.

> . . . [T]he only remaining foundation for their discrimination theory is a claim that the tax burden borne by the out-of-state consumers of Montana coal is excessive. . . . Either way, the premise of appellants' argument is invalid. Furthermore, appellants have completely misunderstood the nature of the inquiry under the fourth prong of the *Complete Auto Transit* test.

Commonwealth Edison v. Montana, 453 U.S. 609, 620-621.

The theory advanced by PGE would utterly disrupt every state tax system. Nothing is more commonplace in the utility business than the principle that taxes, accrued in one state, may be passed on to ratepayers in another state. *Appalachian Power Co. v. Federal Power Commission*, 382 F.2d 237 (4th Cir. 1964), cert. den. 379 U.S. 829 (1964). It matters not one whit that the ad valorem taxes imposed upon PGE in Montana, as a result of its operation and use of the Colstrip generating plants, will ultimately fall upon Oregon ratepayers and consumers. PGE would be completely barred from raising a Commerce Clause discrimination argument upon those facts. In a similar fashion, its theory about exportation of beneficial use taxes to its consumers in Oregon must be rejected.

3. The Beneficial Use Tax Statute is Administered by the Department of Revenue in an Even Handed Fashion Which Favors the Colstrip Owners.

PGE again makes an erroneous reference at page 20 of its Petition to Mont. Code Ann. § 15-24-1203 (1987). The taxes at issue were not imposed pursuant to that statute.

a. Montana Cooperatives or Preference Customers of BPA do not Use the 500 KV Transmission Line System.

PGE persists in its misinterpretation of the Department's Brief to the Montana Supreme Court. Its attention

is respectfully invited to a major portion of the Brief concerning beneficial use interests in the 500 kv system. It is denominated "The Preference Customers of Bonneville Power Administration Do Not Use the Montana Intertie". (DOR Brief, Pg. 31, November 10, 1988).

The Montana Supreme Court disposed of PGE's argument concerning preference customers or cooperative customers. The Montana Supreme Court specifically held, "In regard to the Owner's claims regarding the REAs, we note they do not use the Montana Intertie line, nor possess firm transmission demands in 500 KV lines which may be taxed in 1984, under § 15-24-1203, MCA." *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176, 1188.

The Colstrip owners and PGE are thus reduced to contesting a fact issue. They abjectly failed to convince the Montana Supreme Court that the cooperative customers of BPA in Montana use the 500 kv system. It is respectfully submitted that this factual finding is beyond the proper ambit of certiorari. *Southern Power Co. v. North Carolina Public Service Commission*, 263 U.S. 508 (1924).

Preference customers of BPA or cooperative customers are distinct from investor-owned utilities. Investor-owned utilities have a profit-making animus. Cooperatives acquire federal power, and sell it to their customers at cost, or without profit. (Pacific – Eskridge Tr. Pg. 474), 16 U.S.C. § 832b (Resp. App. 4). Investor-owned utilities, such as PGE, transmit large blocks of privately owned power across high voltage transmission lines on a bulk power transfer basis. Montana cooperatives have no coal-fired plants. They generate no power. They transmit no power. They are not bulk power transferrers with respect to 500 kv systems. They purchase federal power at a priority firm rate. *Pacific Power & Light v. Department of Revenue*, supra. They are not directly served by the transmission lines of BPA. Each cooperative in Montana is served by a wheeling agreement, under which MPC's lines are used to transmit federal power to the cooperative. *Ottertail Power Co. v. United States*, 410 U.S. 366

(1973). According to Mr. Eskridge, the cooperatives did not request that the 500 kv transmission line in Montana be constructed for their benefit. (Pacific – Eskridge Tr. Pg. 555). The Colstrip owners, including PGE, did make such a request.

Congress has accorded specific priority and preference to cooperatives. In enacting the Pacific Northwest Electric Power Planning and Conservation Act of 1980, Congress secured the existing preference or priority rights in favor of all cooperatives. 16 U.S.C. § 839c(a) (Resp. App. 7), 16 U.S.C. § 839g(c) (Resp. App. 9). The specific preference to federal power, which is enjoyed by cooperative customers, was conferred by Congress when it enacted the Bonneville Project Act in 1937. 16 U.S.C. § 832c (Resp. App. 5). Congress specifically classified cooperatives and investor-owned utilities separately, for purposes of disposition of federal power by BPA. 16 U.S.C. § 839c(e). (Resp. App. 8). The historic difference between preference customers of Bonneville and investor-owned utilities, has long been recognized by the courts. *Central Lincoln Peoples District v. Johnson*, 735 F.2d 1101 (9th Cir. 1984).

The Montana Supreme Court correctly held that cooperative customers of BPA are not similarly situated entities, with respect to the use of 500 kv transmission lines. They do not use the 500 kv system, and it was not constructed for their benefit. There is no discrimination under the commerce clause. *New Energy Co. of Indiana v. Limbach*, supra.

b. The Department of Revenue's Assessment Methodology is not Dependent Upon Actual Power Flow.

PGE misreads the Department's assessment methodology and the Montana Supreme Court's decision.

> Reviewing the facts, we conclude that the tax was imposed on the privilege of using the property. The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby

ignoring actual flows and the lines' west to east transmission capacity.

Portland General Electric Co. v. Department of Revenue, 773 P.2d 1189, 1194.

PGE is again contesting a factual issue which it lost. Such a factual determination is not a basis for a writ of certiorari. *General Talking Pictures v. Western Electric Co.*, 304 U.S. 175 (1938).

The Department's assessment methodology ensures that the measure of the tax is the reserved transmission demand in favor of PGE in its Garrison West Agreement. PGE is taxed, based upon the reasoned business judgment which it exercised in reserving transmission line capacity. As the Montana Supreme Court noted, the assessment methodology was adopted "[t]o eliminate any influence of 230 KV lines in the assessment, . . ." *Portland General Electric Co. v. Department of Revenue*, supra, at 1193.

This Court has held that a tax will not be overturned based upon differing valuation methodologies, so long as the method or rule is fair. *Western Union Telegraph Co. v. Attorney General*, 125 U.S. 530 (1888).

The taxes levied upon PGE for reserving the right to continuously transmit 65 megawatts of Colstrip power across the 500 kv system, amounted to $12,700 for 1985. This nominal amount of taxes is not discriminatory. Its argument as to a burden upon out of state consumers was rejected by this Court in *Commonwealth Edison v. Montana*, supra.

c. The Department's Assessment Methodology Mitigates the Tax Assessment in Favor of PGE.

PGE persists in another valuation argument which was soundly rejected by the Montana Court. This Court has repeatedly sustained utilization of the unit method of appraisal, in order to value interstate property. *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585 (1907), *Louisville & Nash R.R. Co. v. Greene*, 244 U.S. 522 (1917).

The Montana Supreme Court specifically held that the beneficial use assessment had been integrated into the Department's unit method of appraisal. *Portland General Electric Co. v. Department of Revenue*, 773 P.2d 1189, 1193. The inclusion of the beneficial use cost of the Hot Springs to Idaho Border portion of the 500 kv system, was mitigated in the unit method. Its inclusion in the cost indicator was weighted by 40%. PGE's assessment was based upon 40% of the depreciated cost of the line, times the reserved transmission demands in the transmission line system. This method insured that there was no full attribution of the entire cost of the transmission line system to PGE, as a measure of its beneficial use interest. *United States v. County of Allegheny*, supra.

The hypothetical example offered by PGE, at pages 23 and 24 of its Petition, falls under its own weight. A transmission line cannot be operated to transmit 1,300 megawatts of power simultaneously in each direction. Since the power flows will in fact cancel, the example is hypothetically irrelevant, and practically impossible.

D. The Fourteenth Amendment: The Imposition of Beneficial Use Taxes Upon PGE Does Not Violate the Due Process or the Equal Protection Clause.

Challenges to a state tax, upon due process grounds, are rare indeed. *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934). The nexus requirement compelled by *Miller Bros. v. Maryland*, 345 U.S. 340 (1954), cannot be disputed in light of the material set forth in this Brief. Without the use of the Hot Springs to Idaho Border portion of the 500 kv system, PGE would have been unable to transmit its limited 65 megawatt share of Colstrip power, prior to the completion of the 500 kv system from Garrison to Taft. (PGE – Mikolaitis Tr. Pg. 77). PGE requested that the 500 kv system be completed to Hot Springs, in order that its Colstrip power could be transmitted pursuant to the terms of its contract. BPA complied with the request. The nexus between the use of a system which was specifically designed to transmit Colstrip power, and the physical

existence of 350 miles of 500 kv system across Montana, is evident.

> The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable.

Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, ___ U.S. ___, 109 S.Ct. 633, 638 (1989).

Preference customers of BPA are singularly distinctive from investor owned utilities. The former are not users of the 500 kv system, while the latter are. The Montana Legislature drew a reasonable distinction by providing for the beneficial use taxation of 500 kv systems.

The misinterpretation of Mont. Code Ann. § 15-24-1203 (1983), by PGE is evident. The statute requires that possession *or beneficial use* be established as a predicate for taxation. These disjunctive and equally justifiable bases for taxation, are precisely the bases which were sustained by this Court in *United States v. County of Fresno*, supra.

CONCLUSION

The Writ of Certiorari sought by PGE should be denied.

Respectfully Submitted,

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